IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.192 OF 2006

...

Islamic Republic of Iran-
Shipping Lines ...Petitioner

v/s.

Galaxy Multimodal
Systems (Pvt) Ltd. ...Respondent

...

Mr.P.S. Pratap with Mr.M.R.Khatri & Mr.H.G.Pratap for the Petitioner.

Mr.Vishal Sheth with Mr.R.A.Fernandes for the Respondent.

...

CORAM: D.K.DESHMUKH, J.

DATED: 30th August,2006

P.C.:

1. This petition has been filed for enforcing the Foreign Award. The Respondent has raised objection to the enforcebility of the award.

2. The first objection is that the foreign award cannot be enforced because of the provisions of Section 48(1)(d) of the Arbitration & Conciliation Act. The second objection is that the arbitral tribunal has made the award contrary to the law laid down by the Supreme Court in its judgment in the case of **Kuchwar Lime and Stone Co. v/s. M/s.Dehri Rohtas Light Railway and Co.Ltd. AIR 1969 SC 193**.

3. So far as the first objection is concerned, it is common ground that as per the arbitration agreement between the parties, the arbitral tribunal is to consist of two arbitrators, one to be appointed by each party. According to the Respondent the award has been made by the arbitral tribunal consisting of two arbitrators and therefore composition of the arbitral tribunal is contrary to the provisions of

Sections 15 & 16 of the Arbitration Act in force in England.

4. So far as second objection is concerned, the submission is that the arbitral tribunal has awarded demurrage without considering that it was the liability of the Petitioner to mitigate the demurrage. The arbitral tribunal, however, has held that the Petitioner is entitled to recover the amount of demurrage and there is no liability on the Petitioner to mitigate the demurrage.

5. So far as the first ground is concerned, perusal of the arbitration clause which is Clause 18 of the Shipment agreement shows that the arbitral tribunal shall consist of two arbitrators. Clause 18 of the Shipment agreement reads as under:-

> 18. Any dispute arising out of this contract shall, unless the parties agree forthwith on a single arbitrator, be referred to the final arbitration in London of two arbitrators who shall be commercial shipping men carrying on business in London. English law shall govern the interpretation/ execution of this

contract.

6. It is clear from perusal of Clause 18 of the Shipment Agreement that there is an agreement between the parties in relation to composition of arbitral tribunal. Section 48 (1)(d) of the Arbitration Act reads as under:-

> 48(1)(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;

7. Perusal of the above provision makes it clear that enforcebility of a foreign award can be refused by the court if the court finds that the composition of the arbitral tribunal was not in accordance with the agreement between the parties, and if the court finds that there is no agreement about composition of the arbitral tribunal between the parties, then the court has to make an inquiry whether the composition is in accordance with law of the country where the arbitration took place.

8. In the present case undisputedly there is an agreement between the parties regarding composition of the arbitral tribunal and therefore the law in force in England which is the country where the arbitration took place is not required to be considered. In other words, if the composition of the arbitral tribunal is in consonance with the agreement between the parties in relation to composition of the arbitral tribunal, then even if the composition of the arbitral tribunal is contrary or is not in consonance with the law in force in relation to the composition of the arbitral tribunal in the country where the arbitration took place, then also the court can not refuse to enforce the foreign award. In the present case there is an agreement between the parties in relation to the composition of the arbitral tribunal. It is nobody's case that the composition of the arbitral tribunal, which has made the award, which is the subject matter of the petition is not in consonance with the agreement between the parties. Therefore, in my opinion, enforcement of the foreign award cannot be refused. It is further to be seen here that apart from the fact that the law in relation to the composition of

the arbitral tribunal in force in the country where the arbitration took place is not relevant in the present case, still the composition of the arbitral tribunal is contrary to the law in force in the country where the arbitration took place, then the party against whom the award is made would be entitled to challenge the validity of such an award in that country. However, I have been informed that the Respondent has not challenged the validity of the award which is the subject matter of the present petition in England because an objection to the composition of the arbitral tribunal was not raised by the Respondent before the arbitral tribunal. If that is so, then allowing the Respondent to raise an objection to the enforcebility of the award on the ground that the composition of the arbitral tribunal is contrary to law in force in England is impermissible.

9. So far as second ground of challenge is concerned, the vessel reached the port of discharge on 25th October, 2003. The vessel berthed on 29th October, 2003 and the discharge commenced from 31st October, 2003 and completed on 2nd February, 2004. The Petitioner had filed a detailed statement of

facts as to how the discharge proceeded. Perusal of the document No.9 shows that major portion of time was consumed because the vessel could not discharge the cargo because wagons were not available on the port of discharge. The Respondent has raised the objection in following terms:-

FAILURE TO MITIGATE LOSSES/EXERCISE LINE

(4) Clause 8 of the charterparty, allowed IRISL to exercise a lien ".... on the cargo and on all sub freights payable in respect of the cargo, for.... demurrage.... and for all other amounts due under this charter party....." IRISL were consequently entitled to allow discharge of the cargo under lien at Beria. Further, if IRISL has chosen this option, the vessel would not have been inordinately delayed at the discharge port. Under the circumstances IRISL having failed to exercise their lien and act in a prudent manner/did not mitigate their losses and are consequently not entitled to claim demurrage for 86 days.

10. It appears to be the case of the Respondent that after reaching the port of discharge because there was delay involved in discharging the cargo, the Petitioner should have exercised lien on the cargo and discharged the cargo at the port of discharge. But though the Petitioner had clearly stated that the discharge was delayed because of non-availability of wagons, the Respondent admittedly has not led any evidence to show that there was any other method available to the Petitioner for discharging the cargo. In my opinion, in view of the statement of facts filed by the Petitioner before the learned arbitrator, it was for the Respondent to lead evidence to show how the Petitioner could have mitigated the demurrage.

11. In this view of the matter, therefore, even assuming that it was for the Petitioner to take steps to mitigate the demurrage, in my opinion, in the present case the award made by the learned arbitrator cannot be faulted on this ground. In so far as the judgment of the Supreme Court in the case of *Kuchwar Lime and Stone Co.* (supra) is concerned, perusal of that judgment shows that after the wagons reached the

station where the cargo was to be discharged, the consignee refused to take delivery and therefore the Supreme Court has held that steps should have been taken by the railway to discharge the cargo immediately in order to minimize the demurrage. In the present case, it is nobody's case that the party to whom the cargo was to be delivered declined to accept the cargo. It is also nobody's case that there was any other method available to the Petitioner to discharge the cargo speedily.

12. In these circumstances, therefore, in my opinion, it cannot be said that the award is contrary to the law laid down by the Supreme Court in its judgment in the case of *Kuchwar Lime and Stone Co.* referred to above. Thus, I find that there is no reason why enforcebility of the foreign award, which is the subject matter of the Petition, should be refused.

13. In the result, therefore, the petition is granted in terms of prayer clauses (a) & (b). Petition disposed of.

14. The Petitioner will be at liberty to apply to

the Prothonotary & Sr.Master for taking back the original of the Award in accordance with law.

...